IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. 05-CV-329-GKF-PJC
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the court on the Cargill Defendants' Objection to June 2, 2009 Opinion and Order (Dkt. No. 2128). [Doc. No. 2234]. Defendants challenge the ruling by United States Magistrate Judge Paul J. Cleary granting plaintiffs' Motion to Compel Expert Discovery Regarding Dr. Thomas Ginn [Doc. No. 2011].

I. Standard of Review

A magistrate judge's order in a pretrial matter may be reconsidered where it has been shown that the order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A). *See also* Fed.R.Civ.Proc. 72(a) (on nondispositive matters "[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law."). Under the clearly erroneous standard, "the reviewing court [must] affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

II. Background

The gravamen of this dispute is the discoverability of materials seen by an expert who was initially hired as a consultant and was later designated as a testifying expert. Dr. Thomas Ginn was hired as a consulting expert by the Cargill defendants in 2005 to evaluate information relating to the IRW and provide "general consulting advice" regarding available data. At that time, the Cargill defendants hired experts from Exponent, Inc. ("Exponent") to head two consulting teams: a "biological issues" team and a "transport fate source dynamics" ("TFSD") team. Dr. Ginn was in charge of the biological issues team and an undisclosed consulting expert was in charge of the TFSD team. Dr. Ginn was also project manager over all of the Exponent consultants, and in this role was responsible for insuring the teams were on time, within budget and staffed appropriately.

The biological issues team, led by Dr. Ginn, studied the status of the biological communities in the Illinois River Watershed ("IRW"), looking at the available information on the presence of communities such as fish, benthic macroinvertebrates, and fresh water mussels. Dr. Ginn remained a consultant until May 2008, when Oklahoma disclosed its first liability reports and the Cargill defendants decided to have him become a testifying expert on the status of the biological communities in the IRW, specifically focusing on fish and benthic macroinvertebrate communities.

When the Cargill defendants produced Dr. Ginn's expert report on January 30, 2009, they also produced to plaintiffs "all materials that Dr. Ginn examined or relied upon in formulating the opinions stated in his expert report." [Doc. No. 2019, p. 1]. The Cargill defendants made a supplemental production to plaintiffs on April 14, 2009. The supplemental production included materials that were "factually related to the subject matter of Dr. Ginn's reported opinions" and

that Ginn had, at some point "seen." [*Id.*, p. 2]. The Cargill defendants redacted from the April 14 production all references to the privileged work of the separate confidential consulting expert. During Dr. Ginn's deposition on April 16, 2009, a dispute arose concerning documents the Cargill defendants withheld and redactions they made in documents they had produced pursuant to Fed.R.Civ.P. 26(b)(4)(B). As a result, plaintiffs filed a motion to compel production of *all* documents and other information Dr. Ginn received from any of the Cargill defendants' consulting experts or which he generated as a consultant in connection with the case; production of non-redacted copies of all materials listed on the Cargill defendants' April 14, 2009, redaction log with respect to Dr. Ginn; and production of Dr. Ginn for a second deposition wherein he would be required to answer all questions concerning information he generated and obtained in his role as a consulting expert and project manager, including all information contained in the materials produced after April 13, 2009. [Doc. No. 2011, p. 1]. The State contended Rule 26(a)(2)(B) trumps Rule 26(b)(4)(B) in cases where a consulting expert becomes a testifying expert; therefore, production is required.

The magistrate judge, in his Opinion and Order, granted the State's Motion to Compel was granted in its entirety. [Doc. No. 2128, p. 15]. In their Objection to the magistrate judge's ruling, the Cargill defendants assert the ruling was "clearly erroneous" in the following respects:

(1) The magistrate judge erroneously ruled contrary to his own previous opinions that the defendants carry the burden of proof on the issue of whether any waiver of the consulting expert privilege had occurred.

(2) The magistrate judge erroneously applied a higher standard of proof than that of the "preponderance of the evidence standard" when he ruled that the defendants had not "clearly

made" the delineation between Dr. Ginn's roles as consultant and testifying expert.

(3) The magistrate judge erroneously ruled the "ambiguity" identified in (2) above must be resolved in the State's favor.

(4) The magistrate judge, in granting the State's motion, failed to make any inquiry into factual relevance of the materials at issue.

(5) The magistrate judge's view of the factual record was clearly erroneous, inasmuch as the testimony of Dr. Ginn established the only aspect of the TFSD team's work in which he participated was that pertaining to his biological data work, all of which was disclosed.

III. Analysis

With respect to so-called "consulting experts," Rule 26(b)(4)(B) provides that ordinarily, "a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." Thus, while Dr. Ginn remained a consulting expert, facts known to him and opinions held by him were shielded from discovery.

However, Dr. Ginn's transition from consulting expert to testifying expert gave rise to Rule 26(a)(2)(B) obligations. With respect to "testifying experts," Rule 26(a)(2)(B) requires the expert to provide a written report which must contain, among other things:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the data or other information *considered by* the witness in forming them.

Fed.R.Civ.P. 26(a)(2)(B) (emphasis added). "'Considered' is a broader term than 'relied upon' and includes material the expert examines but rejects." *Palmer v. Asarco, Inc.*, 225 F.R.D. 258,

261 (N.D.Okla. 2004). Documents are "considered" under Rule 26(a)(2)(B) if the expert has "read or reviewed the privileged materials before or in connection with formulating his or her opinion." *Id.*, citing *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 306 (W.D.Va. 1998).

> Rule 26(a)(2)(B) requires that testifying experts produce all material that was considered by them in forming their opinions. If the subject of the materials directly relates to the opinion in the expert report, this creates at least an ambiguity as to whether the materials informed the expert's opinion. Courts have held that ambiguity as to whether a witness considered certain materials in forming his or her opinion as a testifying expert should be resolved in favor of disclosure.

Palmer, 225 F.R.D. at 261. (citations omitted).

Where, as here, an expert is both a "consulting" and "testifying" expert:

> The delineation between a witness' shifting roles must be clear as must the distinction between documents having no relation to an individual's role as an expert and those considered by the witness in developing his expert opinions.

Holder v. Gold Fields Mining Corp., 239 F.R.D. 652, 660 (N.D.Okla. 2005), citing *Construction Industry Services Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 52 (E.D.N.Y. 2001).

In this case, the Cargill defendants asserted all non-biological communities materials and information in Dr. Ginn's files that he created, received or reviewed, including the undisclosed consultant's work, are protected under Rule 26(b)(4). However, the magistrate judge concluded defendants had failed to establish the clear delineation between the roles and the documents reviewed.[1] In so ruling, the court observed that the Cargill Defendants had acknowledged that the redacted April 14th materials they produced and that Dr. Ginn had "seen" as a consultant are factually related to the subject matter of his expert report, and cited examples of such materials.

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[1]The Opinion and Order did *not*, as defendants assert, impose a "clear and convincing" standard of proof of the delineation. The order merely quoted language in case law requiring a "clear delineation." *See* p. 5, *supra*, and *Construction Industry Services Corp.*, 206 F.R.D. at 52.

[Doc. No. 22128, pp. 13-14]. Furthermore, the court noted that Dr. Ginn, in his role as project manager, had received and reviewed reports from the TFSD team and was aware of the team's preliminary results; and that Dr. Ginn and the TFSD consultant had conducted joint presentations and meetings with the Cargill defendants. [*Id.*, p. 14]. The court concluded:

> In sum, the Cargill Defendants have not shown that Dr. Ginn neither considered the TFSD team's work nor his general consulting work in formulating his expert opinion. It is not whether Dr. Ginn *evaluated* temperature data, dissolved oxygen, phosphorus levels, phytoplankton or algae, nitrogen levels, chlorophyll-a levels, aerial hypolimnetic oxygen demand, bacterial levels, particular phosphorus sources, water quality data or any of the factors of the TFSD team's scope of work. It is whether he *considered* the information; *i.e.*, whether he reviewed, reflected upon, read and/or used the information in connection with the formulation of his opinions, even if he ultimately rejected the information. *Turnpike Ford, Inc. v. Ford Motor Co.*, 244 F.R.D. 332, 334 (S.D.W.Va. 2007). The Court finds that the delineation between Dr. Ginn's roles as consultant and testifying expert has not been clearly made, and the ambiguity thus must be resolved in Oklahoma's favor.

[*Id.*, p. 15].

The court, having reviewed Magistrate Judge Cleary's Opinion and Order, the pleadings of the parties and exhibits thereto, as well as applicable case law, concludes the Magistrate Judge's Opinion and Order is not clearly erroneous or contrary to law, and should therefore be affirmed.

IV. Conclusion

The Cargill defendants' Objection to June 2, 2009 Opinion and Order [Dkt. No. 2128] is hereby denied.

ENTERED this 20th day of July, 2009.

Gregory K. Frizzell
United States District Judge
Northern District of Oklahoma